

**[Unapproved and Subject to Change]**  
**CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION**  
**MINUTES OF MEETING, Public Session**

April 24, 2006

Call to order: Chairman Liane Randolph called the monthly meeting of the Fair Political Practices Commission (Commission) to order at 9:30 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Randolph, Commissioner Gene Huguenin was present. Commissioners Sheridan Downey, Phil Blair, and Ray Remy participated through teleconference.

**Item #1. Public Comment.**

There was none.

**ACTION ITEMS**

**Item #2. *In re Pirayou* Opinion Request (O-06-016).**

Chairman Randolph asked for any questions or comments from the Commission.

Commissioner Blair asked for clarification that the Commission has the authority to make this decision. The staff report indicated that there was no one who says the Commission cannot make that decision and Mr. Pirayou indicates that there is no question whether the Commission can make exceptions to its own rules. However, there does not seem to be a definitive conclusion.

Chairman Randolph replied that the Legal Division memorandum states there are arguments on both sides of the issue and there is no clear definitive rule one way or the other.

Commissioner Blair asked if there was any precedent for this situation.

Chairman Randolph answered that there is no precedent on this particular code section.

Commissioner Blair noted the section of the *Watson* opinion that is quoted on page 6 of the draft opinion. The last sentence reads, "This is totally consistent with the FPPC's duty to implement the *intent* and not the *literal language* of the statute."

John Wallace, Assistant General Counsel, responded that when staff advises the Commission as its attorneys they tend to be risk managers, and what the Commission is looking at today has never happened before. No Commission prior to this one has considered doing this type of action in this forum. Therefore, what staff has tried to do is apply other authority that may be analogous to this setting. As the Chairman mentioned in the last meeting, there are no opinions

that do what the Commission is considering today. *Watson* is a strong case and it gives staff a lot of flexibility, however, as risk managers, staff is saying that there is nothing that says the Commission will never be challenged and nothing that says there is no possibility the Commission would lose this case.

Commissioner Blair said that a second question concerns what precedent would this opinion set. Depending on how this vote turns out, the Commission should spend some time on this issue in order to determine a clear policy in the event that there is a similar case to this one in the future. Commissioner Blair confirmed that there is no legislation that says the Commission cannot take this action.

Chairman Randolph confirmed that staff has indicated that there is no statute prohibiting the Commission from making this decision.

Commissioner Downey commented in response to Commissioner Blair's question regarding whether the adoption of the draft opinion would reflect some sort of policy decision that is new to this Commission saying that an earlier Commission did adopt a regulation which said specifically that the transfer of campaign funds had to be made before they became surplus. There is no argument here that the funds are not surplus. The policy of the prior Commission reflected in the regulation is different from what is being proposed today. Commissioner Downey also said that the fact is that the idea of holding a candidate responsible for the mistakes of a treasurer or a lawyer comes up all the time and the Commission has a policy on that. The policy of the Commission regarding this issue in enforcement cases has been not to let the candidates of the hook if the treasurer or attorney is given bad advice.

Commissioner Blair said that the convincing point was the repeated testimony that at least six times Ms. Corbett asked her treasurer to be sure to transfer the money. Ms Corbett overtly tried to do the right thing.

Mr. Wallace said in response to a question from Commissioner Remy that as an attorney, it would seem negligent not to cite this opinion in an enforcement action irrespective of the disclaimer in the opinion. This is an issue that comes up in consideration of mitigation. It is unclear to what extent this opinion will be effective in limiting its use in other contexts.

Commissioner Downey added that the policy the would be put forth by this Commission if it allowed Ms. Corbett to violated the statute is the same policy that comes up in enforcement cases, the difference simply being that there has already been a violation instead of a candidate asking for a free pass to go ahead and violate. That is the puzzle put forth in the comment letter submitted by Mr. Nottleson, in which he seems to be asking where the common sense is in the idea of adopting this opinion. It is unclear where the difference is between this case and the policies the Commission has had for so long in enforcement cases of holding candidates accountable for the mistakes of there colleagues.

Commissioner Remy wondered if the Commission would be faced with the same set of arguments almost any time the Commission would want to exercise discretionary judgments on matters of equity. The idea that if the Commission does exercise this discretionary judgment, it

is likely to jeopardize something, therefore it would be more prudent not to do so and rather, to be a strict constructionist of the law.

Commissioner Downey agreed with Commissioner Remy's thought. The Commission is on treacherous ground with this decision.

Commissioner Remy said that the Commission is also on treacherous ground on the other side of the question in that not exercising that judgment may be implying that the latitude the Commission has is very narrow if it chooses not to do anything that may deviate from the safer ground, even if the matter is one of equity.

Commissioner Downey replied that with the discretion, the Commission can go either way. Assuming that the Commission does have the discretion to make this decision, the question is whether there are reasons not to decide to adopt the opinion anyway. That is what the Commission is here to discuss today. The primary reason not to allow this opinion is the possible spill over to Enforcement and a second reason would be the direct, not an indirect, conflict with the policy of holding candidates responsible for the errors of treasurers and lawyers.

Chairman Randolph agreed with Commissioner Downey's comments. To the extent that there is no definitive authority one way or the other, the Commission is on the ragged edge of the sphere of its authority. Given that the Commission is on such an edge and that there are some potential downsides to allowing this to happen, adopting this opinion would not be an appropriate use of this discretion.

Chairman Randolph asked for other comments from the Commission.

There were none.

Mr. Pirayou explained that there is clearly precedent where this Commission, through its staff via the vehicle of the policy advice letters versus the Commission's full opinions, has in a couple circumstances used its discretion to do what was something that was contrary to the strict application of the law when there was a good faith error of law shown. Mr. Pirayou respectfully disagrees with staff and cited the *Miller* letter where it says, "The Commission, in extraordinary circumstances where hardship would otherwise result and the purposes of the Act would not be furthered by a strict application of the law, has allowed committees to remedy an error that was made due to a good faith misreading of the law." Mr. Pirayou also cited the *Tomberlin*, *Johannessen*, and *Roney* advice letters. Those are circumstances where the Commission staff has exercised the discretion of the Commission to remedy a wrong. Mr. Pirayou also pointed out that the issue of precedent is important. Just as the Chairman Randolph stated at the last meeting, the *Miller* was not necessarily rightly decided and based upon that opinion, she was not going to vote to issue this opinion, so can future Commissioners, once the Pirayou opinion has been adopted, use their independent judgment and exercise their independent thinking to decide whether or not to follow a precedent. By issuing this opinion, the Commission has not in any way obligated itself to always follow it in future cases, no matter what the particular circumstances are. Ms. Corbett has met an extremely high threshold based upon the precedents and principles of the Commission's advice letters that are still valid and have not been rescinded,

based upon all the other factors of equity and based upon the Commission's ability to exercise the discretion. The facts are narrow and very high in terms of a threshold. To not give Ms. Corbett her due on these facts based upon a fear that future Commissions cannot take each case upon their own merits is difficult to understand. Given the fact of clean hands and the tremendous effort that Ms. Corbett made to prevent this situation, she is entitled to this relief.

Chairman Randolph asked for any other questions or comments from the Commission.

Commissioner Huguenin stated that he intended to vote for the proposed opinion because from time to time the Commission needs to do what is right, as opposed to what the risk managers recommend as the most prudent decision.

Commissioner Downey asked if Ms. Corbett would have been in violation of the provisions of the surplus funds statute if the treasurer's error had been discovered a week after the funds had been transferred from the assembly to the senate campaign, or would she not have violated the statute because it was the treasurer who made the error. That issue is one of the problems that is concerning with this case because it seems unclear how this is different from an enforcement case and why the same policies suggested by Mr. Pirayou would not apply in an enforcement case.

Commissioner Huguenin said that this is not an enforcement case and sets of facts on either side can be supposed, however, the draft opinion provides enough flexibility to this Commission and future Commissions to take matters that may come down the road in enforcement or otherwise on their own merits or demerits. Rather than spending the day discussing various other scenarios which may be before the Commission but are not, this draft opinion should be adopted.

Commissioner Remy asked if the draft opinion before the Commission today includes the language that would also require documented evidence as well as sworn testimony.

Mr. Wallace answered yes, the draft does include the requirement of documentary evidence.

Commissioner Blair asked for clarification on the specific language in which Commissioner Remy was referring to.

Commissioner Remy responded that the language in question is on page 8 of the draft opinion that reads, "and can also provide additional documentary evidence corroborating the material facts contained in their sworn testimony" in bold text. If there is a motion, it should be confirmed whether that language is included or not.

Mr. Wallace recommended that if a motion is made, it should reflect that you do want that language included in the opinion. The draft opinion shows it in brackets because the specific language had not yet been reviewed by the Commission.

Commissioner Downey asked what additional documentary evidence the current case has presented outside of the affidavits.

Commissioner Remy replied that there was no other documentary evidence present in the current case. Since there has never been a requirement and the Commission has never given an opinion on such a request as put forward by Ms. Corbett, the Commission could not very well require the evidence now. However, by putting this language in to the opinion, it would give guidance to future Commission's that a sworn testimony affidavit is not enough evidence. There must be something in writing or some other sort of documentary evidence.

Commissioner Downey clarified that the current case does not have this evidence, but that any future cases will be held to the requirement.

Commissioner Remy confirmed that would be the intent of the additional language.

Commissioner Huguenin made a motion to adopt the draft opinion including the documentary evidence language, which was proposed by counsel.

Commissioner Blair seconded the motion.

Chairman Randolph asked for any further discussion on this matter.

There was none.

The motion passed with a 3-2 vote. Chairman Randolph and Commissioner Downey voted Nay and Commissioners Blair, Huguenin, and Remy voted Aye.

Chairman Randolph asked for confirmation from staff of the effective date of the opinion.

Luisa Menchaca, General Counsel, replied that the opinion is effective once it is adopted and the Commission has thirty days to publish it, allowing any Commissioner to submit a concurrence or dissent to be included. That time period can be shortened but the opinion is effective immediately.

Mr. Pirayou asked for confirmation that the adoption today is final and the transfer can be made.

Ms. Menchaca confirmed that was correct.

The meeting adjourned at 10:20 a.m.

Dated: April 13, 2006

Respectfully submitted,

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Kelly Nelson  
Commission Assistant

Approved by:

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Liane Randolph  
Chairman